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IN THE

Supreme Court of the United States

October Term, 1957

No. 346

In the Matter of the Application of

ANONYMOUS,

Petitioner.

For an Order awarding him custody of his infant daughter,

against

ANONYMOUS,

Respondent.

BRIEF OF THE CORPORATION COUNSEL OF THE CITY OF NEW YORK

August 29, 1957.

PETER CAMPBELL BROWN,
Corporation Counsel of the City of New York.

SEYMOUR B. QUEL,
ALFRED WEINSTEIN,

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Statement

In this custody proceeding, the petitioner seeks the issuance of a writ of certiorari to the Supreme Court of the State of New York, New York County, and to the Court of Appeals of the State of New York to review a judg-

ment entered June 13, 1957 in the Supreme Court, New York County, on the remittitur of the Court of Appeals and the decision of the Court of Appeals dated May 9th, 1957, upon which the remittitur was based.

Petitioner appealed to the Court of Appeals of New York as of right on constitutional questions from an order of affirmance of the Appellate Division, First Department, entered in the office of the Clerk of said Appellate Division on or about June 19, 1956, affirming the order of the Supreme Court, New York County, entered on March 12, 1956 denying petitioner's application for custody and dismissing his petition; and from an order of the Appellate Division, First Department, entered in the office of the Clerk of said Appellate Division, First Department on or about June 19, 1956, affirming an order of the Supreme Court, New York County entered on March 12, 1956, denying petitioner's motion to strike from the records of this proceeding a certain affidavit and for other relief.

The Court of Appeals on May 9, 1957 dismissed the appeal from the order of affirmance denying custody, on the ground that no substantial constitutional questions were directly involved (New York Civil Practice Act, Sec. 588, Sub. 1[a]); and dismissed the appeal from the order of affirmance denying the motion to strike a certain affidavit from the record on the ground that the order does not finally determine the proceeding within the meaning of the constitution.

Thereafter petitioner moved in the Court of Appeals for leave to appeal and this was denied without opinion on July 3, 1957. The order of the Court of Appeals denying the petitioner's motion for leave to appeal was served on August 7, 1957. It is attached as an appendix hereto at page 11.

Facts

This proceeding was originally instituted in the Supreme Court, New York County, by a father to obtain custody of his ten-year-old daughter (fol. 27) and to restrain the Corporation Counsel of the City of New York (fol. 54) from going forward with a Domestic Relations Court proceeding to enforce support of the child, initially brought in Massachusetts at the instance of petitioner's ex-wife, the child's mother, and forwarded to the jurisdiction of the State of New York under the provisions of the Uniform Support of Dependents Law (McKinney's Unconsolidated Laws, §2111, *et seq.*), hereinafter referred to as the "Statute". Mother and child are in Massachusetts. The instant proceeding was instituted by petition and order to show cause which, by the terms of the latter, were directed to be served upon the Corporation Counsel and which stayed that officer from prosecuting the support proceeding (fols. 27-29).

The order of the Supreme Court, New York County (Markewich, J.), denied the application for custody of the child, dismissed the petition and vacated the stay against the Corporation Counsel (fols. 23-24). At the same time, another order was entered which denied the petitioner's application to strike an affidavit submitted in opposition to the petition. On the petitioner's appeal to the First Department of the Appellate Division of the Supreme Court both orders were unanimously affirmed without opinion. 2 A D 2d 674 (1st Dept., 1957). Thereafter the petitioner appealed as of right to the New York Court of Appeals, claiming constitutional questions, from both orders of affirmance of the Appellate Division. The first appeal was dismissed on the ground that no substantial constitutional

questions were involved and the second on the ground that the order appealed from did not finally determine the proceeding.

Petitioner then moved in the Court of Appeals for leave to appeal and this motion was denied.

We point out at the outset that no review is here sought with respect to the order denying petitioner's application to strike an affidavit. It is only with respect to the decision of the Court of Appeals on the first order mentioned above and the judgment thereafter entered on the remittitur of that court that the petitioner asks for a writ of certiorari.

Throughout the entire course of this litigation, the Corporation Counsel has consistently maintained a limited position. Though he had, in form, moved in the Supreme Court for an order dismissing the proceeding (fols. 67-69) the argument submitted in support of the motion was restricted to a demonstration that the support proceeding in the Domestic Relations Court should not be interfered with (fol. 79). In the course of the proceedings, the office of the Corporation Counsel addressed a letter to the Supreme Court at Special Term, a copy of which was received by petitioner's attorney, in which attention was called to the limited statutory role of the Corporation Counsel as attorney in the support proceeding, imposed upon him perforce Section 2i12 of the Statute, and to his non-participation in the controversy regarding custody (fols. 357-358).

Our position here is similarly limited. We make no argument regarding the propriety of the order in question except insofar as it refuses the restraint upon the Corporation Counsel. In this regard, we urge that the refusal

was proper and that no constitutional questions are raised thereby, at least while petitioner has not been awarded custody of the child, since the Statute has been satisfied, no violation of any right of petitioner or threat of irreparable injury is shown, and it appears that the child is in need of the support which is sought in the Domestic Relations Court proceeding.

Petitioner urges (Petition, pp. 9, 29) that the Corporation Counsel was attorney for the mother in the support proceeding, and that this status, perforce New York C. P. A., §227-a, made the Corporation Counsel the mother's agent to receive, for her, service of process in this custody proceeding. However, petitioner adds (Petition, p. 9) that, so far as custody is concerned, the Corporation Counsel has no authority to represent the mother as her lawyer.

The Corporation Counsel has no desire to participate in the merits of the controversy regarding custody. For that reason and because of our previously noted limited position, we do not discuss the asserted agency of the Corporation Counsel.

It may be noted that the Court at Special Term, in the "hope that others with knowledge and information may voluntarily appear and participate," directed the Corporation Counsel to communicate with the mother and others (fols. 392-393). The Corporation Counsel complied. Thereafter the mother's brother-in-law conferred with court personnel and then submitted the affidavit which petitioner seeks to strike (fols. 185-187).

Our recital of the facts is limited to those we deem material to the question of the stay. There is a poignant controversy in regard to matters affecting custody, not described in this brief. It emphasizes the desirability of

affording, at least to the child, such mitigation as can be brought by enforcement of her father's duty to support her, rather than to have her wait until the custody issue has been decided.

(a)

Petitioner and his wife, Selma, were divorced in Massachusetts in 1953. The decree awarded custody of their daughter, Dorothy Gail, to the mother (fol. 31). Apparently petitioner had consented to this custody provision (fol. 253).

During the summer of 1954 mother and child came to New York (fols. 32-33). In February of 1955 the mother left the child in care of the petitioner and voluntarily entered a hospital in New York, from which she was transferred to a hospital in Massachusetts (fols. 33-37).

In April of 1955 James Zisman, husband of the child's maternal aunt, came to New York, and, without the knowledge or consent of the petitioner, took the child to Massachusetts. Mr. Zisman acted pursuant to a Massachusetts court order (fols. 210, 221) which, on March 25, 1955, awarded temporary custody of the child to Mrs. Zisman (fols. 112-114). Petition for such award had been made on the ground of the mother's temporary illness (fols. 109-111).

(b)

Thereafter, petitioner, following an unsuccessful attempt in New York to institute a proceeding to obtain custody of the child, for the same purpose brought habeas corpus in Massachusetts, in which the Zismans were respondents (fols. 40-41). He was unsuccessful, the writ having been dismissed on July 15, 1955 (fol. 232), and peti-

tioner's appeal therefrom is pending (fols. 42-43). Apparently petitioner had begun a prior habeas corpus proceeding in Massachusetts, which he discontinued on June 23, 1955 (fol. 180). It appears that petitioner has instructed his Massachusetts attorneys to bring another habeas corpus proceeding in that jurisdiction (fol. 48).

(c)

On September 23, 1955, on the petition of Mrs. Zisman, who had been awarded temporary custody on March 25, 1955, the Massachusetts court granted custody of the child to its mother, as originally provided in the divorce decree (fols. 127-129). At that time the child's mother had successfully, since May 25, 1955, conducted her affairs in her status as an out-patient of the Massachusetts hospital (fols. 244-246).

On September 28, 1955, the mother petitioned a Boston court for support (fols. 45, 55-63). The matter was transmitted to the Domestic Relations Court under the provisions of the Statute (fols. 71-73), and, on October 25, 1955, the instant petitioner appeared in the proceeding in that court. That matter having been adjourned for a week, the instant proceeding was begun on October 27, 1955 (fols. 76-77).

(d)

The mother's petition for the child's support recited that the instant petitioner, pursuant to the Massachusetts divorce decree, was to pay $25 weekly for the support of the child; that no payment had been made since June 9, 1955; that the mother, while receiving out-patient treatment at a state hospital, earned $45 weekly "gross," and required $25 weekly for the support of the child (fols. 55-62). Petitioner tacitly admits his failure to support the child (fols. 48, 104).

POINT I

The refusal to stay the Domestic Relations Court support proceeding under the Statute raises no Federal constitutional questions.

Petitioner has not asserted that the Statute has not been complied with or that the Domestic Relations Court has no jurisdiction of the support proceeding pending under the Statute. It seems clear that, so long as an order has not been made awarding custody of the child to its father or otherwise disposing of the question of its support, the commencement of this proceeding does not oust the Domestic Relations Court of jurisdiction. See *D. M. E.* v. *D. D. E.*, 179 Misc. 406 (Dom. Rel. Ct., N. Y. C., 1942); *Caldwell* v. *Caldwell*, 189 Misc. 845 (Dom. Rel. Ct., 1947); *Duggan* v. *Duggan*, 39 N. Y. S. 2d 375 (Sup. Ct., Queens Co., 1942—not officially reported); *Wodzinski* v. *Wodzinski*, 204 Misc. 789 (Sup. Ct., Queens Co., 1953); McKinney's Unconsolidated Laws, §2114; cf. *Rosenberg* v. *Rosenberg*, 241 App. Div. 411 (1st Dept., 1934); *Matter of Magner* v. *Smyth*, 144 Misc. 840 (Sup. Ct., West. Co., 1932); *Magner* v. *Magner*, 144 Misc. 740 (Child. Ct., West. Co., 1932), affd. 240 App. Div. 894 (2d Dept., 1933). The matter obviously involves the internal administration of the Courts of New York State. *In re Burrus*, 136 U. S. 586 (1890).

In this connection, we inform the Court that in the Domestic Relations Court proceeding which the petitioner unsuccessfully sought to stay, that Court entered an order of support pending the completion of interrogatories for which, under the Statute, the respondent father [the petitioner here] applied. The Appellate Division has reversed the order of support, holding that the failure to return the interrogatories addressed to the mother prevented the

Domestic Relations Court from making a direction for support. *Aberlin* v. *Aberlin*, 3 A D 2d 417 (1st Dept. 1957). There the matter rests. We view the question of the propriety of the refusal to grant a stay, under these circumstances, as having become academic, since the father (the petitioner here) is under no present obligation to provide support, at least until the interrogatories are returned.

POINT II

No Federal constitutional questions are raised by a dispute involving custody of a child.

With due regard to the limited position herein taken by the Corporation Counsel, we nevertheless deem it proper to point out, as this Court said in *In re Burrus*, 136 U. S. 586 (1890), that (pp. 593-594):

> "The whole subject of the domestic relations of husband and wife, parent and child, belong to the laws of the States and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of Congress, or any treaty of the United States or its Constitution."

Nor can it be said that there has here occurred a violation of the "Full faith and credit" clause of the Constitution. On the contrary, the petition was dismissed *because* full faith and credit was given to the decrees of Massachusetts (Petition, p. 42). And see *Aberlin* v. *Zis-*

man, 244 F. 2d 620 (U. S. C. A., 1st Cir., 1957 [petition for writ of certiorari filed August 16, 1957, Docket No. 373]), where the decrees of the Massachusetts courts were held to be a complete bar to an action brought by this petitioner against the Zismans (the sister and brother-in-law of the respondent herein) for damages arising out of the alleged abduction of the daughter from the petitioner's "custody."

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

PETER CAMPBELL BROWN,
Corporation Counsel of the City of New York.

SEYMOUR B. QUEL,
ALFRED WEINSTEIN,
ANTHONY CURRERI,
Of Counsel.

APPENDIX

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the third day of July A. D. 1957.

Present, Hon. ALBERT CONWAY, Chief Judge, presiding.

Mo. No. 258

In the Matter of

the Application of Anonymous,

Petitioner-Appellant,

For an Order awarding him custody of his infant daughter,

vs.

Anonymous,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

RAYMOND J. CANNON (signed)
Clerk